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# Supreme Court of the United States

OCTOBER TERM, 1958.

**No. 394.**

IN THE MATTER

*of*

The Application of KINGSLEY INTERNATIONAL PICTURES CORPORATION,

Appellant,

For an Order Pursuant to Article 78 of the Civil Practice Act,

*against*

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellees.

*ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.*

## APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

1. The appellants have filed in this Court a document entitled "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm".

In so far as the motion is to dismiss the appeal, it is necessarily based upon Rule 16(1)(a) of the Rules of this Court, which makes such a motion available when it is

contended "that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules".

No facts are, or could be, alleged by the Appellees which would bring this appeal within Rule 16(1)(a). Their entire argument is set forth in their Point IV (pp. 6-12), headed "No New Federal Question is Presented by This Attempted Appeal". No suggestion is made, there or elsewhere in the Appellees' Statement, that this appeal was not taken in meticulous conformity to statute and the rules of this Court.

The motion, in so far as it is a motion to dismiss, should accordingly be denied.

2. In so far as the motion is to affirm the judgment and decree below, it rests solely on the Appellees' contention that no *new* federal question is presented by this appeal. The Appellees' argument is completely groundless and unsound. Novelty has never been a requisite for the jurisdiction of this Court. The Court has never refused to proscribe the denial of a fundamental right merely because it had done so before. The argument is, moreover, factually incorrect. One of the major questions presented by this appeal has never before been considered by this Court and another, though it has been considered, is still undetermined.

The constitutionality of Section 122-a of the New York Education Law is drawn in question by this appeal. The statute is a recent enactment designed to circumvent the determination in *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587. The instant case is the first in which the validity of the law has been challenged.

Appellees' argument in their Statement to this Court is directly contrary to their position in the New York Court of

Appeals. There, seeking to engage the favorable attention of that Court in order to secure the reversal of a decision favorable to Appellant, Appellees opened their argument with the statement: "The problem presented in [sic] this picture is brand new."* Now the Appellees, hoping to insulate the favorable Court of Appeals decision from review, present the problem as so stale as to be unworthy of the Court's attention.

A separate major issue presented by this appeal is whether the entire statutory system of licensing moving pictures imposes an unconstitutional restraint on freedom of expression. This question, again, Appellees say is not "new", for the reason that: "While in every motion picture case which has come before this Court, the Court has been importuned to hold precensorship illegal, this Court has refused to do so" (Statement Opposing Jurisdiction, p. 9).

As pointed out in our Jurisdictional Statement (at p. 13), that issue was formulated in the *Burstyn* case, and the Court there indicated doubt with respect to the validity of the licensing system (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. at pp. 503-504). But the issue was specifically left unresolved because resolution was not essential to a determination of that appeal. In later appeals the Court similarly left the question open (see cases cited in our Jurisdictional Statement, p. 16). In that sense, but only in that sense, the Court has failed to hold the precensorship statutes unconstitutional. But it is unreasonable to construe the Court's reservation of the issue as an adverse disposition. That is particularly true in the light of the dictum

* Court of Appeals Brief, p. 6. The sentence was prefixed to a paragraph otherwise substantially the same as the opening paragraph of their argument here (Statement Opposing Jurisdiction, pp. 6-7).

in the *Burstyn* case to the effect that, in general, such prior restraints as are imposed by the statutes under consideration are "especially condemned", and that the State of New York shall have a "heavy burden" if it attempts to sustain the validity of the laws (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. at pp. 503-504).

3. At page 9 of their Statement Opposing Jurisdiction the Appellees refer to support allegedly given years ago to "the motion picture law, itself", by various organizations. Though the point is of only incidental significance, we deprecate this effort to impress the Court by invoking "facts" which have no basis whatever in the record.

## Conclusion.

**The motion to dismiss or affirm should be denied.**

November 11, 1958.

Respectfully submitted,

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